Hoffman Security, Ltd. *and* District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO. Cases 4–CA–20303, 4–CA–20435, and 4–CA–20495

September 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS DEVANEY AND COHEN

On December 10, 1993, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hoffman Security, Inc., Voorhees, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Cohen does not rely on the judge's gratuitous comment that the Respondent's attempt to reclassify the receptionists was for the purpose of avoiding bargaining with the Union. The General Counsel does not allege, and the record does not support, that assertion.

Margarita Navarro-Rivera, Esq., for the General Counsel.
Jeffrey L. Braff, Esq., of Philadelphia, Pennsylvania, for the Respondent Employer.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO (the Union) filed timely charges in the captioned cases and based on these charges, the Regional Director for Region 4 issued complaints and ultimately a notice of hearing and order consolidating complaints dated July 6, 1992. The consolidated complaint (complaint) alleges that Hoffman Security, Ltd. (Respondent, Hoffman, or the Employer) engaged in certain specified conduct which violates Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent filed a timely answer admitting the jurisdiction and certain other allegations of the complaint, but denying that it violated the Act.

Hearing was held on these matters in Philadelphia, Pennsylvania, on February 10–12, 1993. Briefs were received from the parties on or about May 3, 1993. Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Hoffman Security, Ltd., a New Jersey corporation, with an office and place of business in Voorhees, New Jersey, has at all times material to this proceeding been engaged in the provision of security services, including the provision of such services to Graduate Hospital, Philadelphia, Pennsylvania. Respondent admits the jurisdictional allegations of the complaint and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE INVOLVED LABOR ORGANIZATION

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and the Issues for Determination*

Hoffman engages in the provision of security services, primarily for health care facilities. As pertinent, it had a contract to provide security services, including the provision of security guards and receptionists, for the Graduate Hospital in Philadelphia, Pennsylvania. The last contract it had with Graduate was for 3 years and was to expire by its terms in December 1991. It was extended until July 1992, when Hoffman lost the contract and ceased its relationship with the Hospital. The Union commenced an organizational drive among the Respondent's 14 receptionist employees at Graduate Hospital in the spring of 1990. Employees Barbara Bennett, Shirley Davis, and Ruth Bates were the most active employees on behalf of the Union. Barbara Bennett passed out union authorization cards, was a member of the union negotiating committee, and attended all the negotiation sessions between the Respondent and the Union. Ruth Bates talked to other receptionists about the benefits of unionization, passed out union authorization cards, was a member of the union negotiating committee, testified on behalf of the Union at the representation case hearing, and attended almost all the bargaining sessions between the Respondent and the Union. Shirley Davis was a member of the union negotiating committee and testified on behalf of the Union at the representation case hearing.

The parties entered into the following stipulation: (a) the Union filed a petition in Case 4–RC–17374 on May 24, 1990; (b) a hearing was held in this case on June 12, 1990; (c) the Regional Director for Region 4 issued a decision and order in Case 4–RC–17374 on July 6, 1990, dismissing the petition; (d) the Board issued an order granting petitioner's request for review on November 26, 1990; (e) the Board issued an Order reversing the Regional Director's decision and

order on May 14, 1991; (f) the Regional Director approved a stipulated election on June 5, 1991; (g) an election was conducted pursuant to the Stipulated Election Agreement on June 14, 1991; and (h) the Union was certified as the exclusive representative of the Respondent's receptionists on June 25, 1991. The unit found appropriate is described as follows:

> All full-time and regular part-time receptionists employed by the Respondent at Graduate Hospital located at One Graduate Plaza, Philadelphia, Pennsylvania, excluding all other employees, guards and supervisors as defined in the Act.

Since the inception of the union campaign, the Respondent took the position that the receptionists were guards and that it had no obligation to bargain with the Union. It is Hoffman's contention that this was in response to a letter from the hospital to Hoffman in July 1991, wherein the hospital stated that it considered Hoffman to be in breach of their contract because it did not have security guards at the reception desk. I believe and find that it attempted this change in status to avoid having to bargain collectively with the Union. On September 5, 1991, the Respondent changed the duties of the receptionists and made them guards. The Union did not agree with the Respondent's actions and on September 25, 1991, notified the Respondent that it would be conducting a rally and informational picketing at Graduate Hospital on October 9, 1991. The day before the demonstration was to take place, Respondent notified the Union that Respondent's position had changed and that Respondent would be willing to negotiate with the Union and set an initial meeting from October 16, 1991. The hospital also changed its position with respect to Hoffman's alleged breach of the contract.

The union negotiating committee during the entire negotiations was composed of Union Representative Arthur Rosenfeld and employees Barbara Bennett, Shirley Davis, and Ruth Bates. The Respondent's negotiating committee was composed of Respondent's attorney, Jeffrey Braff, and its vice president of operations, Cheri Tancredi.

On August 21, 1991, in preparation for negotiations, the Union requested from Respondent a copy of the contract between Respondent and Graduate Hospital. Respondent refused to comply with this information request and the complaint alleges that this refusal violates Section 8(a)(1) and (5) of the Act.

The complaint also alleges that Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of business and loss of jobs because Respondent's employees selected the Union as their collective-bargaining representative. It alleges the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Ruth Bates. It further alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act by: withholding annual wage increases and failing to perform annual employee evaluations; rotating Barbara Bennett, Shirley Davis, and Ruth Bates to different posts; refusing to permit unit employees to have water, coffee, or newspapers at their desks; and changing the schedule of unit employees without prior notice to the Union and without giving the Union an opportunity to bargain.

B. *Did the Respondent Violate the Act by Refusing to Provide Information Requested by the Union?*

It is undisputed that the Union formally requested a copy of the contract between Respondent and the Graduate Hospital prior to negotiations. It did so both in writing and in bargaining sessions with Respondent's negotiators. Respondent refused to turn over a copy of the contract, stating that it was confidential, privileged, proprietary information. Respondent's attorney admitted to the Union that the contract, inter alia, contained provisions about the receptionists' wages, benefits, and duties. Although Respondent did not do so at the time the request for the contract was made and refused, on brief it further argues that the Union has not established that the contract was necessary and relevant to negotiations as Respondent was not claiming an inability to pay or relying on the contract to support its bargaining position.

Respondent acknowledges on brief that it has a duty to furnish any nonconfidential relevant information to the Union. I believe and find that the contract was clearly necessary and relevant to the Union's ability to bargain in a meaningful way. The amount of money the Respondent was being paid for the receptionists' services and the benefits afforded them under the contract obviously places some constraints on what Respondent can afford to pay these employees. With this information, the Union could know what it could reasonably seek in negotiations. It would also know what kind of benefits it could seek. It would have a good idea of what would be possible to seek in terms of working conditions. Without the information, the Union would be in the dark with respect to these matters and would not know whether the Respondent was being reasonable or not if it rejected union proposals.

On the other hand, Respondent has not shown what makes the contract confidential or shown that the Hospital even objected to making the contract available to the Union. It did not offer to make parts of the contract available, assuming at least some parts of it would not be considered confidential nor did it seek to get an agreement from the Union to preserve the confidentiality of the contract's provisions beyond the bargaining table. Absent any clear showing of why the contract or any particular contract provisions were confidential, I cannot find that Respondent had a legitimate claim of confidentiality or that it was acting in good faith. I conclude that Respondent's refusal to provide the contract was unlawful and in violation of Section 8(a)(1) and (5) of the Act. *Consolidation Coal Co.*, 307 NLRB 69 (1992); *Leland Stanford Jr. University*, 262 NLRB 136 (1982); *Johns-Mansville Sales Corp.*, 252 NLRB 368 (1980).

C. *Did Respondent Violate the Act by Unilaterally Discontinuing its Merit Raise Program?*

The parties stipulated that prior to negotiations with the Union, the Respondent had a policy of giving employees annual evaluations on their employment anniversary date and would grant, at its discretion, merit wage increases. Based upon merit, raises were sometimes granted and sometimes not given, and sometimes delayed. The last employee to receive an evaluation and receive a raise under this policy was Lucille Storti and she received a raise on September 7, 1991.

The Union brought the matter of discontinuance of the evaluation and merit raise policy to the attention of Respond-

ent at a negotiation session in the fall of 1991. According to Union Representative and Chief Negotiator Arthur Rosenfeld, Respondent's negotiator, Attorney Jeffrey Braff, took the position that because the Union had requested in its proposals that the policy be discontinued in favor of annual across-the-board wage increases and the Respondent was agreeable to that proposal, it would not give any further evaluations and merit increases. Rosenfeld responded by stating that there had been an agreement on this one proposal, but the agreement would not be effective until a complete contract was made and that it was improper for the Respondent to cease its existing wage raise policy. According to Rosenfeld, at a subsequent meeting, Braff took the position that Respondent might be able to reinstitute the merit increase policy if the parties could reach agreement on other issues. It was never reinstituted as the parties never concluded an agreement.

According to Rosenfeld, the parties had agreed to the concept of across-the-board increases, but had no agreement as to amounts nor the effective date of such increases.

Based on the credible evidence, I find that at the time that Respondent unilaterally discontinued its merit wage procedure, it did not have an agreement with the Union to do so, and it had no final agreement on a substitute for the merit wage procedure. I find that though the amount of wage increase granted an employee as a result of the evaluation portion of the system was somewhat discretionary, the annual evaluation of employees and decision making as to whether a raise would or would not be granted was not discretionary. Moreover, though the record is not developed fully on this point, it is highly doubtful that the decision as to whether raises would be given was left to whim, and there must have existed some criteria by which employees were judged in this regard. Further, the Company had a remaining obligation to bargain over the amount of increase which would result from the evaluation if the Union desired to bargain over this point.

The Board discussed this matter in the recent case of *Daily News of Los Angeles*, 304 NLRB 511 (1991).[1] In finding that an employer violated the Act by unilaterally withholding discretionary merit wage increases while bargaining over an initial contract with a newly certified union, the Board stated:

> First, an employer negotiating with a newly certified bargaining representative is prohibited under Section 8(a)(5) from altering established terms and conditions of employment without first notifying and bargaining with the union. Second, merit increases are included in this prohibition unless they ''are in fact simply automatic increases to which the employer has already committed himself.'' *Katz*, supra at 746.[2]
>
> The Board has made it clear that the same bargaining obligation applies whether the issue involved is the employer's unilateral granting of merit increases or its unilateral discontinuance of them. As the Board explained in *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973):
>
> An employer with a past history of a merit increase program neither may discontinue that program . . . nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once anexclusive bargaining agent is selected. *NLRB v. Katz*, 369 U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e. the general outline of the program; however, the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases) becomes a matter as to which the bargaining agent is entitled to be consulted.

In the instant case, the Union did not agree to the discontinuance of the evaluation and merit increase program and insisted that it be maintained until a contract was reached. The evaluation portion of the program was not discretionary, and as applied by Respondent, most of its involved employees received wage increases. For example, Ruth Bates testified that until 1989 or 1990, she would automatically receive a 50-cent-per-hour raise on her anniversary. In 1989 or 1990, she started getting annual evaluations on her anniversary date and would subsequently receive a raise. Barbara Bennett testified that she received a merit increase on each of her anniversary dates.[3]

I find that by unilaterally discontinuing the merit wage increase program without the consent of the Union and/or without reaching impasse in negotiations the Respondent has violated Section 8(a)(1) and (5) of the Act. I further find that Respondent discontinued this policy to discourage union adherence by its employees. There is not valid reason for discontinuing this policy as there was shown to be for some of the other alleged changes Respondent made or is alleged to have made. This change in policy hit the employees in their pocketbooks, and in the absence of some real likelihood of an immediate collective-bargaining agreement with a substitute for the merit increase program, could only serve to frustrate the employees and make them question the value of the Union. In such circumstances, Respondent's discontinuance of the program also violates Section 8(a)(3) of the Act. *Venture Packaging*, 294 NLRB 544 (1989).

D. *Did Respondent Unlawfully Threaten Employees with Loss of Business and Loss of Jobs?*

On January 31, 1992, Mark Hoffman, Respondent's president, addressed a letter to all the receptionists. This letter was given to the employees by their supervisors. Hoffman's letter states in pertinent part:

> Instead of giving us a new 3-year contract, Graduate will only give us a 6-month extension of the security services contract which expired on December 23rd. In addition, Graduate made it very clear that unless our performance improves dramatically by April 30th, it will bring in a new contractor.
>
> We are not sure what triggered this turnabout in Graduate's attitude . . . . Maybe it was the December

[1] The Board's Order was not enforced by the United States court of appeals. *Daily News of Los Angeles v. NLRB*, 979 F.2d 1571 (D.C. Cir. 1992). However, it appears that the Board's decision in *Daily News of Los Angeles*, supra, is still the law of the Board.

[2] *NLRB v. Katz*, 369 U.S. 736 (1962).

[3] On brief, Respondent questions the accuracy of the amount of the increases Bennett claimed she received. However, it does not question the fact that she annually received some amount of wage increase.

> 9th computer theft or subsequent computer thefts? Maybe it was the unionization of the Receptionists? It is probably a combination of all of these.
>
> Second, it means that our performance must be extraordinary, especially between now and April 30th. For most of us, that should be a challenge, but certainly not a problem. For the small group of other employees, let this letter be a warning that we will not permit your unsatisfactory performance to jeopardize our contract and the continued employment of everyone else. You will not be given second and third chances. You will be discharged.[4]
>
> If there is any good news in this letter, it is this: The contract was not terminated and we still have a chance to get a new one. In order to get that new contract, in order to protect our jobs, everyone is going to have to come together and demonstrate what we are capable of doing. We may not get another opportunity.

In a memorandum prepared by Graduate Hospital January 28, 1992, with regard to the Hoffman contract extension, the hospital expresses its concern about the quality and price of the service provided by Respondent. It makes no mention of the unionization of Respondent's employees nor does it set any April deadline for improvement in quality of service.

From the evidence, the mention of the unionization of the receptionists as a cause for the Hospital's dissatisfaction with Respondent is clearly speculation on the part of Hoffman and has no factual basis. Following this speculation, Hoffman notes that because of the change in Graduates attitude, employees' desire for improved conditions would be put on hold, that a small unidentified group of employees are threatened with discharge if they continue their unsatisfactory performance, and there will be increased monitoring of employees performance by management.[5] There is the ultimate threat that the situation could result in the loss of the contract and all jobs. Contrary to Respondent's argument on brief, I find that letter does threaten the employees with the loss of their jobs because of the hospital's dissatisfaction and speculates that one of the causes of that disatisfaction is the union membership of the receptionists. It serves to undermine the Union's position, and is coercive in that by implication it suggests that if the receptionists were not represented by the Union, there may be no problem. I find the Respondent has violated Section 8(a)(1) of the Act by threatening the employees in this manner.

E. *Did Respondent Violate the Act by Rotating Barbara Bennett, Shirley Davis, and Ruth Bates to Different Posts?*

The complaint alleges that since in or about December 1991, Respondent rotated the above-named unit employees to different posts. The Company admits that it did rotate these employees among various posts, but takes the position that this action did not violate the Act because it did not constitute a change in the Company's existing practice.

Rosenfeld testified that at a December negotiating session, Tancredi said that Respondent wanted to rotate the receptionists to different posts so that they would know the working conditions at all of the posts. To achieve this, she said that Respondent would start rotating employees who previously worked only one or two posts to different posts. Tancredi indicated to Rosenfeld that all employees would be affected, but based on conversations with employees he believes only the three alleged discriminatees were actually rotated. Rosenfeld was aware that prior to certification some employees worked more than one post, and some had only one or two regular posts.

Tancredi testified that she wanted the receptionists to be ''fungible'' and trained for all posts. She also received complaints from receptionists who worked a number of posts about those who only worked one post. So she thought it was only fair to rotate the receptionists.

Barbara Bennett testified that in her 14 years with Respondent, she worked one set post during any given time period. She would work another post only in the event another employee called in sick or did not report for work or in an emergency. In November or December 1991, she began being rotated among four different posts on a regular basis.

Shirley Davis was also rotated to four different posts beginning in December. During 1990, Ruth Bates worked at two posts for 11 weeks, and at three different posts for 7 weeks. Beginning in November 1991, Bates was rotated between four different posts.

Set out below is a summary of the information contained in a number of Respondent's receptionists' schedules placed in the record. Given is the name of the employee, the involved week, and the number of posts worked.

	1991									
	1/6	*1/13*	*1/20*	*1/27*	*2/3*	*2/10*	*2/17*	*2/24*	*3/17*	*5/26*
Bennett	1	1	1	0	1	1	1	1	1	1
Bounadonna	1	1	1	1	1	1	1	1	1	1
La Chance	1	1	1	1	1	1	1	1	1	1

[4] A similar reference to a small group of employees that Respondent considered to be a problem was made by Braff to Rosenfeld in a conversation about a week later that concerned a shouting incident at work involving Ruth Bates. In this conversation, Braff told Rosenfeld to be careful, that there were three employees who, because the Union has come in, feel that they do not have to follow the rules. Braff added that these employees were going to cause trouble for the company in terms of the contract with the hospital. It is obvious that the employees referred to are Bates, Bennett, and Davis, the three union activists.

[5] As will be discussed later, Ruth Bates was discharged 3 weeks after the issuance of this memorandum.

	1991									
	1/6	*1/13*	*1/20*	*1/27*	*2/3*	*2/10*	*2/17*	*2/24*	*3/17*	*5/26*
Price	2	3	3	3	2	2	1	2	3	3
Storti	1	1	1	1	1	1	1	1	1	1
Herring	3	3	3	3	2	2	2	2	2	4
Davis	2	2	2	2	2	2	2	2	2	2
Bates	2	2	3	2	2	2	2	2	2	2
Herring J.	2	2	2	2	2	2	1	2	2	2
Chiavaroli	2	2	2	2	2	2	2	2	2	
Williams	0	0	0	0						
Kenney	2	1	1	2	2	1	2	1	1	
Overton					3	3	2	3	3	2
Osmond										3
Miller										3
Powell										[6]1

	1991										
	8/11	*8/18*	*8/25*	*9/1*	*9/8*	*9/15*	*9/29*	*9/22*	*10/6*	*11/3*	*11/10*
Bennett	1	1	1	1	1	1	1	1	1	4	3
Bounadonna	1	1	1	1	1	1	1	1	1	2	3
LaChance	1	1	1	1	1	1	1	1	1	2	3
Storti	0	0	0	1	1	1	1	1	1	3	3
Price	3	4	3	3	3	3	3	3	3	3	3
Bates	3	3	0	3	2	2	2	3	2	4	3
Herring J.	3	4	4	3	4	3	3	3	3	2	3
Davis	1	2	2	2	1	3	3	1	1	4	3
Overton	2	0	4	3	3	3	2	3	3	2	2
Kenney	4	3	4	3	3	3	2	3	3		
Miller	1	2	2	2	2	2	2	2	2	3	4
Herring	2	1	2	1	1	1	1	1	1	3	3
Osmond	4	0	2	3	2	0	2	2	2	3	3
Powell	2	1	2	1	1	2	2	1	1	3	3
Riggins										3	3

	1992		
	3/7	*3/14*	*3/21*
Bennett	4	4	4
Buonadonn-a	2	3	2
LaChance	2	3	2
Davis	4	3	4
Overton			
Bates			
Osmond	3	3	3
Storti	3	1	3
Herring J.	3	3	3
Price	3	2	3
Herring	2	3	2
Miller	3	4	3
Powell	2	3	2
Riggins	2	2	2
Deltore	2	3	3

General Counsel's exhibits set out above reflect that all but four receptionists worked more than one post on a regular basis before certification. The four who regularly worked only one post were Bennett, Bounadonna, LaChance, and Storti. All four of these employees did begin working multiple posts after November 1991. The exhibits appear to me to support Tancredi's position that the Company wanted the rotation to be more fair and make the receptionists familiar with each post. The evidence reflects that work at one post is generally similar to work at another and there does not appear to be any ''good'' or ''bad'' posts. That Bennett and Davis worked four posts whereas most other receptionists worked three does not seem significant to me. I do not find that Bennett, Davis, and Bates were singled out for harassment in this regard and agree with Respondent's position that the Respondent had a practice of rotating employees between posts precertification and postcertification. I do not find that Respondent violated the Act by extending the rotation of posts to all receptionist rather than just the majority of them

[6] Williams left employment during the period and Overton, Osmond, Miller, and Powell were hired.

to constitute a significant enough change in the conditions that existed prior to certification to find a violation.

F. *Did Respondent Violate the Act by Unilaterally Changing the Schedules of Unit Employees?*

The complaint alleges that since on or about March 5, 1992, Respondent changed the schedules of unit employees. Respondent admits it took this action and asserts that it was permissible because it had made schedule changes before certification of the Union. Tancredi testified that prior to certification, she spent a great deal of time drawing up schedules for receptionists. She worked on schedules between January and March 1991, and placed into effect new schedules on or about March 31 of that year. In preparing the schedules, she took into consideration special problems of the receptionists such as maternity leave, babysitting, and transportation. The new schedules also reflected the Hospital's demand for a half hour longer work day for the receptionists.

In September 1991, as part of its attempt to classify the receptionists as security guards, Respondent again changed its schedules. When this attempted classification was abandoned shortly thereafter, it was necessary to revise the schedules again. In October 1991, the Respondent proposed new schedules and met with the Union in a negotiating session to discuss them. The parties reached agreement on the new schedules and on October 16, 1991, Respondent changed the unit schedules and issued a memorandum to employees noting the changes and further noting that the revised schedule was subject to change from time to time.

At a meeting with the Union on February 11, 1992, Tancredi gave Rosenfeld a copy of a memorandum from the hospital which demanded certain staffing and schedule changes for receptionists. Responding to this directive, Tancredi revised the schedules and they became effective in March 1992. According to Rosenfeld, Tancredi said at the February 11 meeting that she would try to make the schedules as equitable as possible and base them on seniority. Rosenfeld was subsequently supplied with a copy of the revised schedules and asked to meet with Tancredi because he considered the schedules ''chaotic.'' This meeting took place at about the time the schedules were implemented. Rosenfeld testified that he informed Tancredi that the Union had several concerns about the schedules. First it was the Union's goal to have all receptionists work at least 35 hours a week, and if the schedules were being revised in part to reflect a cutback in hours the hospital would allow, why were Barbara Bennett's hours being increased from 35 to 40 per week. He told her he believed that the purpose behind this change was to make the other employees angry at Bennett. He also objected to a strange schedule given another employee and voiced his concern that seniority had not been followed in the preparation of the schedules. The schedules also increased the workday for employees by a half hour.

The meeting between Tancredi became contentious and she ultimately said that Rosenfeld had no right to tell her how to run her business and declared the meeting over.

I believe Respondent's refusal to bargain over the schedule changes, which affected both the times employees worked and the number of hours they worked, violated its statutory obligation to bargain. Respondent recognized its obligation in this regard in October when it successfully negotiated schedule changes from those then in effect. There is no lawful reason asserted for its failure to bargain over the unilaterally implemented March 1992 schedules. Therefore, Respondent violated Section 8(a)(1) and (5) by its actions in this regard. *Storer Communications*, 294 NLRB 1056 (1989).

G. *Did Respondent Violate the Act by Refusing to Permit Unit Employees to Have Water, Coffee, Doughnuts, or Newspapers at Their Desks?*

The complaint alleges that since January 1992, Respondent has refused to permit unit employees to have water, coffee, or newspapers at their desks.[7] Respondent admits that it did not permit employees to have the named items at their desks and contends this policy predated union certification. In July 1988, Receptionist Supervisor Barbara Conyers-Epps prepared a policy and procedure memorandum for receptionists which was distributed to the receptionists, including Davis, Bennett, Bates, and Storti, who were working for Respondent at the time.[8] The memorandum, inter alia, states:

> Areas should be kept clean and free of cups, newspapers, and any other non-work related items. Consumption of food or beverages of any kind is not permitted at anytime at the desks.

The memorandum also points out that employees are subject to discipline for violations of its directives.

The Company's employee handbook, which was drafted in 1988 or 1989 and distributed in September 1991 to the receptionist who had not received the earlier version, includes the following prohibition:

> Do not chew gum, eat, drink or smoke at your post.

On August 4, before the Union was certified, unit employee ValJean Herring was disciplined for having a tray of food at the front desk. The disciplinary report, signed by Conyers-Epps states:

> ValJean was caught with a tray of food at the front desk. Employee is aware that this is not allowed. Recommend any future incidence employee will be dismissed.

Bates and Bennett testified that prior to certification, the employees were allowed to have coffee, water, doughnuts, and newspapers at their posts, so long as the employees exhibited moderation.[9] After certification, in January 1992, the Company posted a written notice halting the practice. How-

[7] This list was expanded to include doughnuts at the hearing.

[8] Bennett testified that she never received a copy of this memorandum whereas Bates testified she could not remember if she had received a copy. Storti testified that she did receive one in 1988. I credit Conyers-Epps that the memo was distributed to employees in 1988, including Bennett and Bates. Conyers-Epps appeared credible and was no longer employed by Respondent at the time of the hearing. Bennett and Bates did not appear entirely credible on this issue.

[9] Bennett also testified that Conyers-Epps told her prior to certification that she could have the involved items at her desk so long as it was done discreetly. Conyers-Epps testified in response, ''First of all, there was no eating allowed at the desk. I made reference to a mint. It wasn't food, it wasn't eating, and to my knowledge, that was understood the way I said it.'' Again, I credit Conyers-Epps. The documented evidence strongly supports her position.

ever, when asked to recall an instance where a receptionist actually had any of these items at her post with the knowledge of a supervisor, Bennett could only recall an occasional instance where a supervisor observed a coffee cup at her desk. In those instances, she was told to move the cup out of view and put it in the desk. Rosenfeld testified that he had seen receptionists with the involved items at their desk, but did not specify a time or whether it was with a supervisor's knowledge.

Based on the written policy manuals placed in evidence by Respondent and the testimony of Conyers-Epps, I find that it has had a policy against having the items at receptionists desks for a long period predating the presence of the Union. I also find that the best evidence supports a finding that it enforced this rule prior to the Union's certification. Although Bates and Bennett testified that they were allowed to have these items at their desk, the only instance the either recalled when they had them in the presence of a supervisor was when Conyers-Epps told Bennett to remove a coffee cup from view. Moreover, the discipline given to an employee for having a tray of food at her desk and the severity of the discipline support a finding that the policy was enforced. As I find that Respondent had in effect and enforced a policy against the items before certification, enforcing the policy after certification does not constitute a change in policy and was not unlawful. Accordingly, a warning given to Shirley Davis for a violation of this policy would not be unlawful.

H. *Did Respondent Violate the Act by Terminating the Employment of Ruth Bates?*

Bates began working for Hoffman as a receptionist in June 1985 and was discharged on February 19, 1991. As noted earlier, she was one of the three most active union members and was in a group that Respondent considered to be a problem. She had two supervisors, Florence Chandler and Beverly Conyers-Epps. She worked about 35 hours a week. Her rate of pay to start was $3.35 per hour and she was making $7.75 per hour when fired.

She punched in and out on a timeclock, usually punching in at about 6:53 a.m. and punching out at about 1:53 p.m. When she worked at the Medical Building, she would clock out at 12:53 p.m. She would observe her supervisors when she clocked in. She was never told that she could not clock out a few minutes ahead of the hour her shift ended.

On February 17, she was working at the Medical Building and worked her complete shift. She was to be relieved at the end of her shift by Lucille Storti. Bates spoke with Storti by phone about 1:50 p.m. Bates made the call to make sure that Storti was her relief and that she was coming to the Medical Building. At a hearing for workmen's compensation, Bates testified that she spoke with Storti about 1:35 p.m. The conversation, according to Bates just confirmed that Storti was coming to relieve her.[10] After the call, she got her personal things and left the Medical Building about 1:53 p.m.. Her supervisors were in the clock area when she clocked out and Bates gave Conyers-Epps some keys as she left. Bates went to catch a shuttle bus, but was intercepted by Chandler, who said, ''You know you can't leave without somebody showing up.'' Bates replied, ''Well, what is it that you want me to do? I've punched out.'' Chandler said, ''Don't ever leave your post again without somebody showing up exactly before you leave.'' This conversation lasted 3 to 4 minutes. Bates then went home. Later that day, she called Chandler from her home. Bates could not understand why Storti was late getting to the post as she had told Bates on the phone she was on her way and she should have arrived in a couple of minutes.

Bates asked Chandler if Storti was going to be reprimanded for being late arriving at the post. Bates did not remember Chandler's reply. Bates worked the next day and no one said anything about her leaving her post unattended. On February 19, in the afternoon, Conyers-Epps relieved her at her post and told her that then Security Director Gilligan wanted to see her. Bates went to the office and Gilligan asked her what had happened on February 17. She told him that she thought that Storti was on her way to relieve her and she left, but Storti did not show up. Gilligan told her that she was suspended pending further investigation.

On February 22, she had a phone conversation with Gilligan in which he told her she was terminated. Gilligan said she was being discharged for leaving her post unattended. Bates contends that she was never told that she could not leave her post before relief arrived. She testified that she had previously left her post with relief being present. She testified that sometimes a supervisor will call and say that you can get ready to leave because relief is coming. She also testified that she had gone to relieve other receptionist and found that they had already gone. She said this was often the situation with receptionist Rita Osmond when she worked at the Tuttleman Center. She also observed other receptionist leaving their posts, naming receptionists Frieda Powell and Algene Herring. However, Respondent's policy seems to have been that an employee could leave a post unattended if done with a supervisor's permission. It is not clear from the record whether the employees she noted had left their posts unattended do so with permission.

Cheri Tancredi testified that she made the decision to fire Bates and the decision was based on job performance. She took into consideration the prior discipline of Bates as well as an instance in which she gave Bates a verbal warning for taking an excessive break to smoke. She testified that she confronted Bates about this and warned her about leaving her post without informing or receiving the consent of a supervisor. She also claimed that she kept records and Bates had been tardy about 20 or more times in 1991.[11]

[10] Storti testified that she had two telephone conversations with Bates on February 17, but denied that either was in the afternoon or that she told Bates that she was on her way. Based primarily on the demeanor of the witnesses, I credit Bates' testimony in this regard. This credibility determination is also based on the fact that Bates was not shown to have left her post early or unattended in the past.

[11] I did not believe Tancredi's testimony about Bates' firing. Her expansion of the reason for the termination is contraryto Gilligan's stated reason to Bates. It is also broader than the reason the Respondent's attorney gave to Rosenfeld after the discharge. In this conversation, Braff toldRosenfeld that Bates was fired for leaving her post. If there were other, legitimate reasons for discharging Bates, I believe that Braff would have articulated them all. I further do not credit Tancredi's testimony about the incident in which she claims to have observed Bates taking an excessive break and warned her. Tancredi was shown to be meticulous about keeping records of

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Tancredi testified that the Company's policy is that receptionists are not allowed to leave their posts without proper relief. If relief does not show up timely, the receptionist is to contact her supervisor and report the situation, and the supervisor is to solve the problem. Respondent's printed general orders, inter alia, provide: ''You shall remain on your post until relieved. You shall obtain permission of the shift supervisor to be relieved for breaks and meal periods. You shall not quit your post at the end of your shift until your relief arrives.''

Although I do not believe Bates' prior discipline played any real part in the decision to fire her, she was disciplined on February 4, 1992, for a verbal confrontation with employee Charles Coates. Both she and Coates engaged in profanity in the emergency room waiting area. She received a written warning for this incident. The warning states it was for eating after punching in and engaging in a verbal confrontation with Security Administrator Charles Coates using profanity in the emergency room waiting area. Her remarks on the warning are: ''Do not agree with fighting on company time. I was not aware of F. Chandler being a witness since her name was not mentioned at any meeting.'' Bates testified that she had clocked in and had a piece of sandwich in her hand. She did not want to take the sandwich to the front desk, so she chose to stand there for a couple of minutes to eat it in the emergency room. She was talking to a fellow employee, saying it was a shame that you have to hurry up and eat and try to get to your post all at the same time. Coates then interrupted saying that if it wasn't for you and the union, you wouldn't have to do that. The two then began arguing. Supervisor Chandler overheard the fight and came in and said, ''Ruth, you hurry up. Finish your sandwich. Go to your post. And Coates, you go wherever it is that you're going.''

In October 1991, she was suspended for unexcused absence, insubordination, and violation of company rules regarding call outs. The remarks state: ''Employee R. Bates was scheduled to report for work on 10–9–91 at 7:30 a.m. and reported off on 10–9–91 at 8:30 a.m. (one hour after the start of her shift). Recommend 3 working day suspension.'' An explanation appended to the suspension states: ''On 10–8–91 around 15:55 as Ruth Bates was leaving for the day, she spoke to me about the fact that she had a doctors appointment on 10–9–91 at 8:30 a.m.'' She said she didn't know how long the doctor would keep her and that the doctor would most likely be checking for other things. She ended by saying she would call out. I reminded her as she walked away, to call EMC. I told her she would have to do this on her own time.'' signed by Supervisor Beverly Epps.

Bates was given only a 25-cent-an-hour increase following her last evaluation because of excessive tardiness.

Respondent's disciplinary policy allows for dismissal for leaving a post without relief or without permission. Tancredi denied knowledge of any other employee leaving their post without relief or without a supervisor's permission. This is not supported by the documented evidence of record. Disciplinary documentation placed in evidence reveals:

Receptionist Prestina Overton left her post in the medical building unattended for 15 minutes on February 27, 1986, and did not get a warning. On May 9, 1988, Overton failed to show up for work and failed to call in, for which she received a 3-day suspension. On August 27, 1988, Overton abandoned her post in the medical building and walked out on the job. Overton was suspended for 5 days. The warning detailing the incident and the discipline was signed by Epps. Overton was suspended again on November 14, 1988, for 3 days for poor attendance. Overton continued to work for Respondent.

Receptionist ValJean Herring was suspended on June 23, 1990, for allowing her children to misbehave in the hospital and not controlling them while in the hospital. She had been verbally warned about this a month earlier. In August 1990, she was given a written warning threatening dismissal if there was a future occurance, citing her for eating food at her desk. In June 1991, she was given a written warning for failing to follow the call in procedure and called in 2 hours after she was to have reported for work. Then, and most significantly, Herring was given a written warning which reads: ''ValJean left her post without proper authority and was caught upon returning to her post with food items. Employee has had written and verbal warnings in the past regarding both these offenses! The warning is witnessed by Tancredi and signed by Tancredi.

Herring's disciplinary history is similar, though worse than Bates' and yet she was given no punishment for the last offense, really a double one, as she was simultaneously violating the policy against eating on the job and leaving her post without permission.

Shirley Davis was given a warning for leaving her post without relief and without permission on June 8, 1990, with no suspension or discharge.

The only difference I can see between Overton, Herring, and Davis on the one hand, and Bates on the other, is the fact that she was a union activist who violated a company rule after the Union was certified. Tancredi attempted to explain this obvious disparate treatment of Bates by saying that the discipline handed out to the others was done before she came to Graduate Hospital and before the contract situation with the hospital became critical. That, of course, does not explain the difference in severity of discipline between Bates and Herring. Herring's similar offense occurred after Tancredi came to the hospital and after she testified she became aware of the hospital's dissatisfaction with Hoffman's performance.

I find that the General Counsel has made a prima facie case that Respondent harbored union animus and that this animus was directed primarily at the union activists, including Bates. Hoffman's letter to employees on January 31, 1991, threatened these employees, in part because of their union membership. Respondent has shown that it had a legitimate reason for disciplining Bates, but the relatively mild treatment it exhibited toward other employees violating the same company policy makes it clear that Bates was fired for her union activity and not for the reason stated. Tancredi's less than candid testimony in this regard also lends weight to the General Counsels assertion that Bates was fired for discriminatory reasons and I so find. Therefore, Respondent has violated Section 8(a)(1) and (3) by discharging Ruth Bates. *Wright Line*, 251 NLRB 1083 (1980); *Phillips Industries*, 295 NLRB 717 (1989).

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employee performance and discipline. There is no such record of this incident.

CONCLUSIONS OF LAW

1. Respondent Hoffman Security, Ltd. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material to this proceeding, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

> All full-time and regular part-time receptionists employed by the Respondent at Graduate Hospitallocated at One Graduate Plaza, Philadelphia,Pennsylvania, excluding all other employees, guards and supervisors as defined in the Act.

4. By threatening employees loss of business and loss of jobs because its employees selected the Union, Respondent has violated Section 8(a)(1) of the Act.

5. By refusing to supply the Union with a copy of its contract with Graduate Hospital, information necessary and relevant to the Union's performance of its statutory duties as collective-bargaining representative of Respondent's employees in the above described unit, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

6. By unilaterally discontinuing its merit wage increase program after September 7, 1991, including withholding annual employee evaluations and wage increases, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act.

7. By unilaterally changing the schedules of its unit employees without prior notice to the Union and without affording the Union the opportunity to bargain over the change, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

8. By discharging its employee Ruth Bates for her union activities and adherence, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

9. The unfair labor practices which Respondent has been found to have committed affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent did not violate the Act except as found above.

REMEDY

Having found that Respondent has engaged in conduct in violation of Section 8(a)(1), (3), and (5) of the Act, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

It is recommended that Respondent be ordered to make Ruth Bates whole for any earnings or benefits she may have lost by virtue of Respondent's unlawful discharge of her. Such backpay should run from the date of her suspension pending discharge until July 28, 1992, the last date Respondent had a contract to provide services to Graduate Hospital. It is further recommended that Respondent be ordered to make its unit employees whole for any loss they may have suffered by virtue of Respondent's unlawful discontinuance of its merit wage program after September 7, 1991.[12] Backpay should be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest thereon computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is further recommended that any reference to the unlawful discharge of Ruth Bates be removed from the records of Respondent and that it provide Ruth Bates with written notice of such removal and inform her that her unlawful discharge will not be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Hoffman Security, Ltd., Voorhees, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of business and loss of jobs because its employees selected the Union.

(b) Refusing to supply the Union with a copy of its contract with Graduate Hospital, information necessary and relevant to the Union's performance of its statutory duties as collective-bargaining representative of Respondent's employees in the appropriate unit.

(c) Refusing to bargain collectively with the Union by unilaterally discontinuing its merit wage increase program including withholding annual employee evaluations and wage increases.

(d) Refusing to bargain collectively with the Union by unilaterally changing the schedules of its unit employees without prior notice to the Union and without affording the Union the opportunity to bargain over the change.

(e) Discharging its employees for their union activities and adherence.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Ruth Bates whole for loss of earnings or benefits she may have suffered by virtue of Respondents unlawful discharge of her, with backpay computed in the manner set forth in the remedy section of this decision, and remove from its records any reference to the unlawful discharge of Ruth Bates and notify her in writing that this has been done and the discharge will not be used against her in any way.

(b) Make all the unit employees whose anniversary dates fell between September 7, 1991, and July 28, 1992, whole for any loss of pay they may have suffered by virtue of Respondent's unlawful discontinuance of its annual merit wage increase program.

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[12] The record reflects that the last annual wage increase performed under the discontinued program was for Lucille Storti, and the date of the raise on September 7, 1991. Any unit employee who had an employment anniversary date after September 7, 1991, and the July 28, 1992 cessation of service by Hoffman would be affected.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in complying with the terms of this Order.

(d) Mail to each of its unit employees on its payroll as of December 1991 and post at its facility in Voorhees, New Jersey, copies of the attached notice marked ''Appendix.''[14] Copies of notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent, be mailed to its employees as directed above, and posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with loss of business and loss of jobs because you selected the Union.

WE WILL NOT refuse to supply the Union with a copy of our contract with Graduate Hospital, information necessary and relevant to the Union's performance of its statutory duties as collective-bargaining representative of our employees in the following appropriate unit:

> All full-time and regular part-time receptionists employed by us at Graduate Hospital located at One Graduate Plaza, Philadelphia, Pennsylvania, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally discontinuing our merit wage increase program, including withholding annual employee evaluations and wage increases.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally changing the schedules of our unit employees without prior notice to the Union and without affording the Union the opportunity to bargain over the change.

WE WILL NOT discharge you for your union activities and adherence.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL make Ruth Bates whole for loss of earnings or benefits she may have suffered by virtue of our unlawful discharge of her, with interest, and expunge from our records any reference to the unlawful discharge of Ruth Bates and notify her in writing that this has been done and the discharge will not be used against her in any way.

WE WILL make all of the unit employees on our payroll as of December 1991 whole for any loss of pay they may have suffered by virtue of our unlawful discontinuance of its annual merit wage increase program.

HOFFMAN SECURITY, LTD.